BANK BUMIPUTRA MALAYSIA BHD, KUALA TERENGGANU

v.

CHENDERING DEVELOPMENT SDN BHD & ORS & ANOTHER CASE

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL KADIR SULAIMAN J
[CIVIL SUIT NO: 23-58-1986]
25 JULY 2000

BANKING: *Banks and banking business - Overdraft facilities - Failure of client to service monthly interests - Withdrawal of money in excess of limit - Whether bank justified in refusing to release further money - Whether facility agreement provided for interest to be capitalised and added on to principal sum - Whether facts showed that client was within limit - Whether bank breached agreement by refusing to release money*

Pursuant to an agreement, the plaintiff bank granted the 1st defendant an overdraft facility for RM5 million to, *inter alia*, enable the 1st defendant to purchase two parcels of adjoining agricultural land and to convert them from agricultural to residential use. The facility was jointly and severally guaranteed by the other defendants who were the directors of the 1st defendant. The disbursement of the said facility was in two stages.

The plaintiff claimed that the 1st defendant did not service the monthly interests. Also, that the 1st defendant misused the said facility by withdrawing an amount in excess of its limit under the first stage. As such, the plaintiff refused to release payment for the conversion fee to have the subject lands converted from agricultural to residential use. On the other hand, the 1st defendant claimed that it was unable to proceed with the intended project as the plaintiff failed to make payments for the said conversion fees.

Held:

[1] Under the agreement, the disbursement of the facility in the first stage was also to provide for the conversion fee. Evidence showed that the 1st defendant did not utilise the amount meant for the conversion fee. Thus, the plaintiff breached the agreement by failing to disburse the said amount. The breach was committed upon the expiry of the six months period allowed by the land authority for the said fee to be paid.

[2] The 1st defendant and its guarantors did not breach the agreement for failing to service the monthly interests. The agreement showed that the interest due on the facility was to be capitalised and added to the principal sum. Further, there was no interest for the 1st defendant to service during the pre-construction period unless there was a breach by the 1st defendant in the implementation of the agreement. The facts indicate that there was no such breach by the 1st defendant.

[3] The facts showed that the 1st defendant was within the limit in the first stage. It was the plaintiff who had erroneously included a sum meant for the second stage into the first stage thereby causing the excess.

[4] As the breach committed by the plaintiff stalled the progress of the project, the plaintiff should make good the loss of profit suffered by the 1st defendant to that extent.

[5] As part of the facility had been utilised by the 1st defendant before the breach, the 1st defendant and its guarantors should jointly and severally pay the plaintiff the amount of the facility so far disbursed with interests.

[Each party to bear its own costs.]

Case(s) referred to:
Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74

Other source(s) referred to:
Chitty On Contracts, 1999, 28 edn, vol 1, para 27-083

For the plaintiff - Tommy Thomas; M/s Tommy Thomas
For the defendants - Cecil Abraham (Thangaraj Balasundram & Mokhtar Ngah with him); M/s Thangaraj & Assocs and M/s Mokhtar Ngah & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman J:

On 29 June 2000 I gave decision in connection with the above consolidated suits that:

(a) The bank was in breach of the agreement as agreed by failing to disburse the amount of fees necessary for the conversion of the subject lands from agriculture to residential when called upon to do so. The breach was

committed at the latest on 5 November 1984 upon the expiry of the period allowed by the authority of six months from 5 May 1984 for the necessary fees to be paid as contained in the letter of 5 May 1984. After which period the approval so given lapsed.

(b) Chendering and its guarantors are not in breach of the agreement for failure to service the interests as required by the bank as it was not the fault of Chendering in not actively proceeding further with the intended project but for the breach of the bank in failing to honour its obligation to disburse the amount needed for the payment of the conversion fees. According to the agreement, any non-payment of interest is to be capitalised and added to the principal.

(c) For the breach committed by the bank upon Chendering, thereby stalling the progress of the project, the bank is ordered to pay Chendering the loss of profit suffered by it to the extent of RM29,279,017.58 with interest at 5% per annum simple interest from 5 November 1984 until judgment and thereafter at 8% per annum until the judgment is satisfied.

(d) As part of the facility had been utilised by Chendering, I order Chendering and Mohamed @ Mohamed Anuar Embong and Maznah Mohd. Noor to jointly and severally pay the bank the amount of the facility so far disbursed to the extent of RM2,553,196.60 together with interest at the contract rate to be calculated until 4 November 1984, thereafter at simple interest of 5% per annum until judgment to be followed by payment of interest at 8% per annum until judgment is satisfied.

In the said judgment I also ordered that each party should bear its own costs. The two suits were consolidated by order of court of 23 October 1989 as they arose out of the same set of facts and involve the same loan transaction between Bank Bumiputra Malaysia Berhad ("the bank") now called Bumiputra Commerce Berhad, and Chendering Development Sdn. Bhd. ("Chendering"). The second, third and fourth defendants in Civil Suit No. 23-58-86 were the directors of Chendering, who allegedly stood as guarantors for Chendering. I will now give my grounds for arriving at such a decision.

By an agreement dated 11 March 1982 (the agreement) the bank granted Chendering a conditional overdraft facility for a sum not exceeding RM5 million. The facility is expressed to be for three specific purposes. They are firstly to enable Chendering to complete the purchase of two parcels of adjoining agricultural land held under title Nos: 1489 and 1490, Lot Nos: 2199 and 2200, Mukim of Kijal, in the district of Kemaman, in the state of Terengganu (the subject land) respectively, secondly, to provide fees for Chendering to convert the land use from agricultural to residential and then to

sub-divide the land into lots for building houses for sale to the public at a profit. Lastly, to help finance the construction, infrastructure and management cost. The subject land is held under state leases. The breakdown utilisation of the facility agreed between the parties is as follows:

a) to complete the purchase of the subject land	RM765,000
b) to pay the authority the conversion and sub-division fees	RM530,000
c) to cover the construction, infrastructure and management costs	RM3,705,000
Total	RM5,000,000

The security for the facility is the first legal charge on the two pieces of the subject land. The facility is to be jointly and severally guaranteed by the directors of Chendering. The facility is to be subject to yearly review. It carries interest but any non-payment of interest shall caused it to be capitalised and added to the principal sum and interest shall be chargeable thereon. It is emphasised that particularly interest charged during the pre-construction period shall be capitalised. As to repayment of the facility, it is repayable in full on demand or expiry of facility or by way of redemption of titles. Pre-disbursement conditions are also provided in the agreement, one of which is the auditor's confirmation that the paid up capital of Chendering is not less then RM250,000.

As to the disbursement of the facility of RM5 million, it is provided that it would be paid out in two stages of RM2.48 million and RM2.52 million. The amount in the first stage may be utilised upon completion of the pre-disbursement conditions. Nine specific purposes, with a breakdown in each case are set out under the first stage of disbursement. Whilst the second stage is to be released progressively against architect's/engineer's certificate for work completed/approved invoices.

The sum of RM2.48 million allocated for the first stage is meant to cover:

a) Balance of the land cost plus other cost associated to the land to be released direct to the bank's solicitors	RM 765,000
b) Conversion fee	RM 300,000
c) Brokerage Commission	RM 35,000

d) Sub-division and registration fees	RM 230,000
e) Legal fees	RM 100,000
f) Advertising	RM 150,000
g) Project Management fees	RM 250,000
h) Advance to Architect	RM 250,000
i) Preliminaries	RM 400,000
Total:	RM2,480,000

A bit of the background of Chendering and its managing director and chairman, DW2 leading to the granting of the facility. Chendering is a company with a paid up capital of only RM250,000 and is owned by UMNO Perhubungan Negeri Terengganu, UMNO Bahagian Kuala Terengganu, and UMNO Bahagian Kemaman, collectively to the extent of 60% of its equity participation. The balance of 40% is by DW2, Dato' Mohamed Anuar Embong, the second defendant in Civil Suit No. 23-58-86. He is the managing director and chairman of Chendering. In 1982 the other directors were, Maznah Mohd Noor, the third defendant, and one Muda Mohamed, the fourth defendant who died in 1985 *ie* after the action commenced by the bank. Apart from holding the equity and position in Chendering, DW2 was then also a registered valuer for Terengganu and was also on the panel of valuers for the bank.

In that capacity on the panel of valuers DW2 became acquainted with the bank and its then executive director, Dato' Hashim Shamsuddin. In early 1982 he was asked by Dato' Hashim to help the bank in getting clients especially the State Government of Terengganu then under the Barisan National of which UMNO is a component part to increase the amount under its fixed deposit account with the bank. DW2 succeeded in his effort to get the State Government to do so by substantially increasing its level of fixed deposits with the branch of the bank in Kuala Terengganu. For this Dato' Hashim was grateful to DW2 and asked him to convey his gratitude to the then Menteri Besar of Terengganu and also informed him that in the event UMNO Terengganu needs any help from the bank, it should not hesitate to come forward.

Other than that DW2 also owns another company known as Mohd Anuar & Co, a registered and licenced housing developer. He is also in control of MAE Bina Sdn. Bhd., a company registered with the authority as a Class "A" contractor. This is a good combination for venturing into housing development project. These companies also maintained their respective account with the bank.

Just around this time in early 1982 the subject land was up for sale. DW2 saw potentials in it to be developed into a housing estate where the houses built thereon could be sold to the public for profit. As an added advantage the subject land is a non-Malay holding land. It is strategically located near the Kerteh Oil Refinery Project which was then up and booming, and also close to the Kemaman Supply Base which was then under construction. The subject land overlooks the South China sea. There is a small hill on the land. DW2 describes it as beautiful pieces of land with spectacular view. However, being agricultural land, in order to develop it into housing it has first to be converted to residential land use and then to be followed by sub-division of that land into small lots for housing. Chendering with a paid up capital of RM250,000 had no other income except from this dream project. Notwithstanding that, looking at the potentials in the subject land DW2 decided on behalf of Chendering to approach the bank for financing to achieve his dream remembering what Dato' Hashim had promised him earlier to help. So, on behalf of Chendering, DW2 approached Dato' Hashim for the overdraft facility of RM5 million to complement Chendering in the carrying out of the intended project. Under this special arrangement, DW2 on behalf of Chendering was asked to submit the usual application for the facility required. He complied with all the necessary requirements of the bank. It is confirmed by the bank's witnesses at the trial that before a facility of this nature is considered the customer has to furnish the feasibility study, project paper and other relevant documents and information to enable the bank to make assessment on the application. On the basis of the evidence contained in Chendering's application the bank formally approved the facility applied for. The approval is contained in a letter dated 11 March 1982 mentioned earlier.

The loan facility having been approved and Chendering having complied with the pre-disbursement conditions, drawdowns began against an account operated by Chendering at the bank's branch in Kuala Terengganu. As evidenced by exh. "P2" tendered by the bank, 13 payments were made by the bank pursuant to the facility. It started with a drawdown of RM34,280 on 17 March 1982. By 23 May 1982 with the drawdown of RM55, the total drawdown had come to RM2,523,196.60. The total drawdown up to 11 September 1982 was RM2,553,196.60. This total amount includes a drawdown on 17 April 1982 in the sum of RM669,000 which is significant and relevant in the decision of these consolidated suits.

It is to be noted that by this time the construction work on the subject land had not commenced, the subject land remaining agricultural before conversion to residential as to its land use. That being so, in the mind of the bank those

drawdowns must relate to the disbursement in respect of the first stage which has a limit of RM2,480,000 only and includes the conversion fee for the subject land. According to PW2, Mohamad Jaafar for the bank, the amount for conversion had been disbursed earlier but he has no evidence to support. He assumed that it has been disbursed because the bank trusts the customer, which is Chendering. So, by a letter as early as 21 August 1982, the bank drew the attention of Chendering to the fact of its exceeding the limit and called upon Chendering to make good the excess. But as observed above, the drawdowns continued until 11 September 1982 when the bank allowed another drawdown of RM30,000 making a total of RM2,553,196.60.

The drawdown on 17 April 1982 of a sum of RM669,000 needs special mention in resolving the dispute. If this amount is not taken into consideration for the purpose of the first stage as contended by Chendering, then even by 11 September 1982 with the drawdown of RM30,000,000 Chendering would have still kept to its limit of RM2,480,000 having utilised only RM1,884,196.60. The whole problem is, the bank apart from producing exh. "P2" its witnesses during the trial was not able to positively identify what each drawdown was for apart from saying that they were for the purpose of the first stage. En. Tommy Thomas for the bank, in his submission, said that the bank permitted Chendering to operate the overdraft facility on the basis of trust, assuming that the purpose of payment of any cheque presented by Chendering under the overdraft facility would be for one of the nine specific purposes and for no other. However, DW2 for Chendering was able to provide the answer which evidence I accept. According to DW2, this amount of RM669,000 drawn on 17 April 1982 was not for the purpose allotted for the first stage but for the second which is by way of approved invoices. The approved invoice was produced by Chendering as evidence. Therefore, it was wrong to include this amount in exh. "P2" for purpose of drawdown allowed upon the completion of the pre-disbursement conditions. As for the first stage of RM2.48 million allotted, the bank had honoured all its obligation thereunder except items involving conversion fee of RM300,000 and sub-division and registration fees of RM230,000. In examination in chief, DW2 testified:

> Refer 'P2' item 7 for RM669,000.00. This is payment made to purchase an equity interest in a granite quarry. During that time there was an offer for sale of 30% equity interest in this granite quarry. We need granite for purpose of our housing development. Since this was not specifically fall within the three purposes for which the facilities were granted, I went to see Dato' Hashim Shamsudin to tell him about the offer and proposal to purchase the equity interest in the granite quarry. He readily agreed with our proposal and asked us to submit a bill for the purchase of the equity utilising the second tranche of the purpose which is

> (b) at page 3 of Bundle "B" under disbursement via approved invoices. I produce the document in support. Collectively marked as "D2A-C". After the suggestion by Dato' Hashim, I went to see BBMB Branch Manager Kuala Terengganu who told me to submit necessary document for payment to be made to the vendor. Consequently, on 15.4.82 Chendering issued a cheque to the vendor amounting to $669,000.00. Cheque No. BBMB 584558 of Chendering Account. I can't now remember the name of the Branch Manager. He then assured me at my insistence that the money is coming from the second tranche thereby leaving the conversion and subdivision intact in the account.

Then in cross-examination, DW2 testified:

> Item No. 7 of RM669,000.00 is in respect of quarry transaction for the purchase of equity of 30% in the granite quarry. The quarry is Bukit Yong Quarry. The shares are still with Chendering ... . This purchase would fall under item (b) of Disbursement at page 3 of Bundle "B" under heading "The balance to be released progressively against architect's/engineer's Certificate for work completed/ approved invoices. Exhibit "D2A", "D2B" and Sales and Purchase Agreement would be the "approved invoices" under (b). I disagree that D2A and D2B are not approved invoices otherwise the Bank would not pay us the amount. ... The Sales and Purchase Agreement was given to the Bank and I don't keep a copy of it.

For the bank, PW2 said in his evidence that he was not aware of the fact that the sum of RM669,000 in exh. "P2" was in respect of the purchase of an interest in the quarry. He was not aware that it was the arrangement Chendering had with Dato' Hashim. Unfortunately, the bank did not call Dato' Hashim to testify at the trial. Thus from the above evidence, I am satisfied that this amount of RM669,000 is not for the purpose of the first stage of drawdowns. I cannot accept the submission by En. Tommy Thomas that DW2 was not candid on this point, the evidence was made up and an afterthought by DW2. There is no reason why I should not accept this part of the evidence of DW2. There is nothing inherently incredible in this evidence of DW2. I find that the bank had fallen into error when it issued a letter of 21 August 1982, drawing the attention of Chendering to the fact of its exceeding the limit of RM2,480 under the first stage and calling upon Chendering to make good the excess. From the evidence, I am also satisfied that the amount meant for conversion fee and sub-division and registration fees had not been utilised by Chendering which remains the obligation of the bank to provide under the agreement.

Then on 1 July 1983 Chendering applied to the Collector of Land Revenue, Kemaman, Terengganu for conversion of the category of land use of the subject land from agriculture to residential. Conditional approval was subsequently given. In respect of Lot 2199 the approval was given through a letter dated 22 April 1984 and in respect of Lot 2200 it was given through a letter dated 5 May

1984. Among the conditions imposed is that fees for the conversion must be paid within six months from the date thereof failing which the approval given would be revoked. As for Lot 2199 the total fee involved is RM16,391.70 and as for Lot 2200 it is RM7,789 making a total of RM24,180.70 for the two lots. In keeping with the terms of the agreement between them Chendering by a letter dated 10 May 1884 (p. 35 in Bundle "B") enclosing the approval letters, informed the bank that the application for conversion of the subject land had been approved by the authorities and called upon the bank to issue a cheque in the sum of RM24,180.70 to the land office being fees for the conversion of the subject land. In the letter Chendering also reminded the bank that the payment must be made within a period of six months from the date of the approval. Otherwise the approval would automatically lapse. The period of six months passed by and until the end the bank did not do so for the reason that the bank believed that the amount from the first stage disbursement had been overdrawn and that the allocation for that had been included in the amount drawn. On the other hand, there is no evidence to support such latter contention but for the alleged excess overdrawing. But on the evidence of DW2 I am satisfied that the conversion fees had not been utilised by Chendering. For the erroneous belief on the part of the bank, En. Thomas submitted that Chendering had misused the facility granted which resulted in the bank refusing to release the sum of RM24,180.70 when Chendering wished to have the subject land converted to residential use to enable it to proceed on with the project. The allocation for the two items under the first stage by the agreement is RM530,000. Therefore, in my view, had the figure of RM699,000 meant for the quarry equity not been erroneously included by the bank in the allocation for the first stage, this amount of RM530,000 would still be within the limit of RM2,480,000 let alone the paltry amount of only RM24,180.70 actually required for the purpose of conversion.

Be that as it may, the bank refused to pay the amount of RM24,180.70 asked for by DW2 on behalf of Chendering to cover the conversion fee required by the land authority. Based on the condition imposed by the land authority, the approval for Lot 2199 lapsed on 22 October 1994 and for Lot 2200 it lapsed on 5 November 1994. Without converting the land use to residential, there could not be any further progress upon the subject land. The purpose of Chendering would be defeated.

Receiving no response from the bank on the letter of 10 May 1984, DW2 on 7 October 1984 called on the branch manager at his office. This is what DW2 said in his evidence in chief:

> Refer page 36 of a letter dated 7.10.84 from Chendering to the bank. On 7.10.84 I met the branch manager himself in his office. He told me that he has been

instructed by the Headquarters not to pay for conversion and subdivision. Refer para 3 on page 36. By the revision of terms agreed I meant to the verbal agreement allowing Chendering to draw the sum of RM669,000.00 for the purchase of the interest in the granite quarry. There was no reply to my letter of 7.10.84 at page 36 of Bundle "B".

Page 36 of Bundle "B" which DW2 is referring to is the letter he wrote to the bank on the same day he met the branch manager. It goes as follows:

Tuan Pengurus,
Bank Bumiputra Berhad,
Cawangan Kuala Terengganu,
Terengganu.

Dear Sir,

Per: PERMOHONAN TUKAR SYARAT KHAS TANAH LOT 2199 PAJAKAN NEGERI 1489 DAN LOT 2200 PAJAKAN NEGERI 1490 MUKIM KIJAL, KEMAMAN DARIPADA PERTANIAN KEPADA BANGUNAN.

My meeting and discussion pertaining the payment for the above in your office today confirms.

I am really shocked and disturbed to be told that the bank is not paying for the conversion fees for the above land, whereas this is one of the mandatory conditions of the facility. Please refer the approval letter.

It is true that the money released to date is in excess of the original limit but this is due to accumulated interest and subsequent revision of terms agreed to by both parties. At any rate the amount for conversion and sub division has not been released yet and the sum required now is a paltry figure of RM24,180.70 only. (Dollars: Twenty Four Thousand One Hundred and Eighty and cents Seventy only).

Unless this sum is paid the bank is in breach of the condition of the facility.

Yours faithfully,

CHENDERING DEVELOPMENT SDN. BHD.

Sgd:
MOHD. ANUAR BIN EMBONG.
Pengarah Urusan.

From the observation made earlier it is clear that by the date of this letter of Chendering, the approval for conversion so obtained earlier has still not lapsed. The bank knows it and also knows that under the agreement with Chendering the obligation to provide the fund for that rests with the bank. If the bank was correct in contending that it had met its obligation earlier by disbursing

the amount required for conversion I cannot find the evidence pointing in that direction. All I can find is that the bank was haunting Chendering and its guarantors with threat of recalling the loan facility for failure to meet the interest demanded knowing fully well that in any event the interest so accrued is to be capitalised and repayable only under any one of the three circumstances stated in the agreement. One is repayable in full on demand. The other is upon expiry of the facility and the other contingency is by way of redemption of titles. The three conditions are in the alternative. On the facts it is not the case of the expiration of the facility unless the bank was correct in saying that Chendering had fully utilised the facility of RM2.48 million meant for the first stage and had abandoned the project before reaching the second stage. I cannot accept the contention of the bank that when the bank denied the amount asked for by Chendering to meet the conversion fee Chendering gave up on the entire development project. It is not the fault of Chendering for not being able to push on with the project because unless and until the condition of the subject land is changed to industrial by the payment of the conversion fee within the stipulated period, it would be illegal and contrary to the provisions of the National Land Code for Chendering to proceed on. The case of redemption of titles does not at all arise here. The only ground is by way of demand. En. Thomas for the bank contends that a consideration of the entire contract, and in particular, the duration clause, the periodical review clause and the repayment clause (which provides that one of the three events of repayment in full on demand) will indicate that the bank has a right to review and cancel the facility for any breach, including non-commencement of the building project on the subject land or non-payment of interest on the part of Chendering. I would not accept this contention because in an agreement of this nature, the facility being given out is for a purpose, it is improper on the part of the bank to invoke the on demand clause before the purpose is achieved unless the failure in the purpose is attributed to Chendering. The bank's witness, PW1, Mat Ghani Mamat, in his evidence testified that the agreement though worded as an overdraft facility it is in fact a bridging loan for specific purpose. He also agreed that unless conversion and sub-division take place on the subject land, little development could be done on it. Another witness for the bank, PW2, who was one of those responsible for conducting the yearly review, explains it all. He said that when they do the review they look at the progress of the project as well as total group exposure. By that he meant if there were other bad loans from any of those in the group, the bank has the right to recall the good loan. In this instance, the review on Chendering was carried out together with other companies where DW2 has interest as could be seen from the review carried out in 1984 as represented in the memorandum of 17 October 1984. This idea brought out by PW2 could be traced from the changing of guard in the management of the bank following

the BMF debacle as transpired in the evidence of another witness for the bank, *ie* PW4, Dato Mohd Taufik Abdullah. The executive chairman of the bank was taken over by Tan Sri Basir Ismail. He brought in PW4 from Bank Negara to be the executive director of the bank in January 1985. According to PW4, their mission was to put the bank in proper footing on account of BMF debacle. Earlier on, based on the memorandum dated 17 October 1984 put up by PW2 in relation to the second year review of the facility granted to Chendering and other related companies where DW2 had a hold, a decision was made that Chendering was required to service interest from November 1984 and to submit proposal to regularise the position. Failing which, the facility should be recalled. The position of Chendering was to be reviewed by 1 January 1985. By the time PW4 came to occupy the position in the bank, another memorandum of PW2 dated 19 March 1985 came to be referred to him. It concerns the review undertaken on Chendering and two other companies where DW2 had a hold. It was reported that there was no firm commitment on the part of the three companies to service interest and regularise the accounts. According to the minute dated 28 March 1985 appearing on the memorandum, it was recommended that the earlier decision, *ie* to recall the facility should be enforced. Without much ado, PW4 directed that the said earlier decision was to be enforced. Up to this time the bank was still acting upon the erroneous impression that Chendering was at fault in exceeding the use of the facility and refusing to move on with the project. In his evidence, PW4 admitted that the reason for the bank taking steps to recall the loan facility was because Chendering did not service the interest knowing fully well that by the agreement the interest is to be capitalised. In answer to cross-examination, PW4 stated that based on information submitted to him and subject to yearly review clause and the information that the amount for conversion and sub-division had been disbursed, he believed that his decision to recall the facility was correct. As earlier stated, I cannot see in what way the failure to proceed with the project is attributed to the failure on the part of Chendering. The purpose could materialise only if the subject land is converted to residential under the National Land Code. Towards this end Chendering had done everything within its power but contrary to the agreement the bank had breached the terms by its failure to make provisions for the payment of a paltry sum of RM24,180.70 to enable Chendering to move on with the project. Yearly review was conducted by the bank but unfortunately the approach taken was on a wrong premise. The learned counsel then put the duty to settle this conversion fee upon Chendering being the registered proprietor of the subject land. He said Chendering could either pay from its own monies the said sum of RM24,180.70 thereby securing the requisite conversion or to apply to the land authority for an extension of time to pay. For not doing any of these things Chendering had acted unreasonably and in breach. It is naive on his

part for saying so because by the agreement the bank undertakes to do so at least to allow Chendering a drawdown for the purpose of the conversion and in this instance proper notice was given by Chendering to the bank to honour its obligation. Despite that the bank refused to honour it. In any event of what good would it do Chendering to do so when on the other hand the bank was pressuring it with the repayment of the purported accumulation of interest on the facility. For that reason, I hold that the bank was in breach of the agreement. The breach was committed at the latest on 5 November 1984 upon the expiry of the period allowed by the land authority of six months from 5 May 1984 in respect of one of the subject land.

Coming now to the alleged breach by Chendering in failing to service the interest on the facility resulting in a formal demand being made and culminating in the issue of a letter of notice to Chendering that the facility had been withdrawn. As stated earlier, as early as 28 August 1982 (p. 25 of Bundle "B") and even before a further drawdown on 11 September 1982 for RM30,000 as evidence by exh. "P2", the bank wrote to Chendering informing it that the account had been overdrawn by RM105,348.43 beyond the RM2.48 million and calling upon Chendering to settle the overdrawn sum. For the reason stated earlier there was a misapprehension in the bank in saying so having regard to the amount of RM669,000 being wrongly classified as drawdown for the purpose of the first stage.

Be that as it may, on 7 October 1982, again before 11 September 1982, the bank wrote another letter informing Chendering that the excess by 7 October 1982 was to the extent of RM2,673,326.46. It appealed to Chendering to operate its limit within bound. Indeed Chendering was keeping within the limit of RM2.48 million meant for the first stage. It was the bank who had erroneously included the sum meant for the second stage of the drawdown into the first thereby causing the excess. In any event, as correctly pointed out by Chendering in its letter of 11 October 1982 to the effect that the excess was not due to utilisation of the fund by Chendering. There appear to be no reply made by the bank to this letter of Chendering.

It is clear from the agreement of 11 March 1982 that the interest due on the facility is to be capitalised. Further emphasis is made in the agreement that the interest charged during the pre-construction period shall be capitalised. At this point of time parties were dealing with the facility occurring during the pre-construction period. Therefore, it is hard to reconcile with the step taken by the bank calling upon Chendering to service the interest except for the erroneous belief that Chendering had been paid the conversion and the sub-division fees but did not want to proceed with the project. On the other hand the amount of drawdowns had exceeded the bound.

On 14 October 1985 after much haggling with Chendering, the bank issued a letter informing Chendering that the bank had made a decision to withdraw the facility and court action would proceed against it. According to the evidence, this decision was made by the bank's head office and the branch in Kuala Terengganu was merely implementing the decision. It arose out of a letter dated 30 July 1985 (p. 325 Bundle "F") from the head office to the branch manager relating to three accounts including Chendering where DW2 is an active figure in each of them. The content of the letter is as follows:

> Dear Sir,
>
> Re: MAE Perkayuan Sdn Bhd
> A/C No. 8332
> Chendering Development Sdn Bhd
> A/C No. 1805
> MAE Realty Sdn Bhd
> A/C No. 7295
>
> We refer to the above matter.
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> It has already been decided that the customers service the monthly accruing interest since November 1984 and to take steps to regularise the position of their account failing which the facility to be recalled.
>
> From your overdraft report dated 11th July 1985 we observe that substantial excess still prevailed in the accounts. In this regards you are to implement the above decision immediately. We expect to receive a copy each of your letter to the customers within two weeks of the date of this letter.
>
> Thank you.
>
> Yours faithfully,
>
> for BANK BUMIPUTRA MALAYSIA BERHAD
> DOMESTIC BANKING DIVISION
> BANKING GROUP
> HEAD OFFICE
>
> sgd:
> (ABU HASSAN ASSARI)
> for GENERAL MANAGER
> CREDIT DEPARTMENT (EASTERN) ZONE 'B'.

Therefore, it is clear that the reason for the bank withdrawing the facility was principally on the ground that Chendering had failed to service the monthly interest accruing since November 1984 and to take steps to regularise the position of their account. For the reason given earlier, there was no interest for Chendering to service in the meanwhile during the pre-construction period unless of course, Chendering had committed the breach in the implementation

of the agreement. On the other hand, on the facts, it was beyond the control of Chendering in not being able to proceed on with the intended project on account of the breach by the bank rendering the subject land remaining agricultural.

Under the agreement, the duration of the facility is to be subject to yearly review. Therefore, there was no time frame determined for the subsistence of the facility. For so long as no breach is committed by Chendering towards the achievement of the purpose for which the facility was granted, the facility would subsist. It is logical for an agreement of this nature to incorporate the provisions as otherwise Chendering would be drawing out the fund but does not proceed on to achieve the purpose for which the facility was granted in the first place. The first year review after the date of the agreement was done by the bank. This is disclosed in the inspection report prepared by the bank's branch in Kuala Terengganu dated 26 March 1983 (beginning at p. 18 of Bundle "C") for the purpose of its head office. This occurred after the drawdown of the controversial sum of RM669,000 on 17 April 1982 and after the last drawdown of RM30,000 on 11 September 1982 rendering a total drawdown of RM2,553,196.60 as stated in exh. "P2". One would expect this inspection report to be adverse to Chendering. On the contrary, the report at p. 19 thereof states that all terms and conditions of the granting of the facility are complied with and at p. 21 the recommendation was "In view of the above, we recommend this facility is to be continued" notwithstanding the remark at p. 18 that the amount outstanding was RM2,831,770.70 against the then approved limit of RM2,480 million. Therefore, up to that stage Chendering had not committed any wrong *viz a viz* the agreement between the parties.

Then by a letter dated 29 May 1983 and repeated in another letter of 19 June 1983 the bank called for the following information from Chendering:

(1) whether the necessary approvals have been obtained that the conversion, layout and building plans, subdivisions etc. If not please give the reasons accordingly.

(2) The present progress/stages of the project that is whether it is only earth leveling stage or otherwise.

(3) Breakdown on the utilization of the overdraft facility apart from the interest charged to us.

According to DW2 he received both the letters which he replied but he could not now produce any record in support but he must have told the bank that there was no approval yet for conversion of the land use from agricultural to housing. In any event from evidence collected the application for the conversion

was made only on 1 July 1983. In court DW2 explains the delay in the making of the application to the land office for conversion by Chendering. The delay in the making of the application since the time of the acquisition of the subject land around April 1982 was on the request made by the then Menteri Besar of Terengganu (the head of UMNO in Terengganu) which was much to his frustration. Despite all that he explained the reason for the delay to the bank. I accept this part of the evidence of DW2 as to the reason for the delay.

For the year 1984, the bank reviewed the position of Chedering *viz a viz* the facility granted in the manner to be found at pp. 23 to 36 of Bundle "C". It is an internal memorandum dated 17 October 1984 from Mohamad Jaafar, PW2, to the senior manager, credit department (eastern) head office. On the memorandum are various handwritten minutes by various officials of the bank. That memorandum of 17 October 1984 makes reference to a certain memorandum of the credit department dated 10 July 1984. However, that memorandum was not enclosed in the bundle. The memorandum of 17 October 1984 was entituled "Position Report of Facilities Granted to Dato' Anuar Embong, His Group of Companies and Facilities Granted Where Anuar & Co. is the Project Manager". The particular report on Chendering is to be found under item 4 at pp. 28 to 29 of the bundle. At p. 29 there is a remark in item (a) concerning the amount of RM2.48 million which was meant for the first stage of the drawdown mentioned earlier on and was released for the purpose of the agreement which includes the provisions for conversion fees of RM300,000. However, no mention is made therein as to when each of the amount was released apart from adopting the amount under heading (a) of the disbursement provision in the agreement of 11 March 1982. The rest of the notes/comments states:

> b) The construction proper is yet to commence. At present only conversion approval has been obtained. We are of the opinion that the actual work on the project will not start in near future.
>
> c) From para (a) (ii) above, it could not be denied that the Bank is financing all the expenses. What we could not understand is that even expenses for Subdivision and Registration, Advertising, Project Management, Advance to Architect totaling $880,000 have been fully disbursed. This is apart from Conversion, Brokerage fee, Legal fee and Preliminaries of $835,000 In view of the above, we are of the opinion that excessive fund has been allowed to be utilized by the customer.
>
> d) The account is already in excess of $967,103-57 due to interest accumulation. Interest charged during the pre-construction period is to be capitalised as per our terms & condition of approvals.

Hence, apart from the allegation that conversion fee of RM300,000, which was the duty of the bank to finance, had been fully disbursed, the memorandum recognized the fact that the excess of RM967,103.50 was due to interest accumulation and the interest charged during the pre-construction period is to be capitalised as stipulated under the terms and conditions of approval of the facility. It is also true that by that time the construction proper was yet to commence. This is so because the conditional approval for conversion of the land use in respect of the subject land was only obtained around April and May 1984. The construction proper was stalled by the non-payment of the conversion fees agreed to by the bank.

Based on the above recommendation in the memorandum, there was a handwritten minute on p. 28 thereof as follows:

> Customer to service interest from Nov. 1984 & submit proposal to regularise position; failing which facility should be recalled. Review position by 1/1/85.
>
> Initial ...
> 29/10.

According to PW2 this handwritten minute is that of Ramlee Mahyudin, the general manager, and the intitial and the date is that of one Shamsudin Ali. PW2 testified that he is aware of the interest capitalisation clause in the agreement as confirmed by his comment under item (d) in para. 4.3 at p. 29. He also testified that the bank took the position to recall the loan for failure to service interest. When he prepared the memorandum, he was aware of the disbursement made as tabulated in exh. "P2". Thus, the second year review of the facility granted was leaning against Chendering for wrong reason thereby suggesting that Chendering was in breach of the agreement. For that reason the bank came up with the idea of getting Chendering to service the interest as a way of mitigating the situation. Little did it occur to the bank as to whether it could impose that obligation on Chendering short of determining the fault of Chendering *viz a viz* the agreement entered into between them and what more to suggest that the failure of Chendering to comply with the demand for interest, the facility should be recalled in the light of the capitalisation of interest clause in the agreement. By this time the bank should know why the project could not proceed on. It is for the reason that the land being agricultural which cannot be turned into a housing project without complying with the conversion requirement. The conversion requirement could not be complied with because the conversion fees had not been paid though the bank believed that it had been paid out to Chendering. This belief cannot be reasonable in the light of the evidence from Chendering. The obligation under the agreement was that of the bank to provide the necessary amount to meet the conversion fees. This fact was pointed out to the bank by Chendering in its letter of 7 October 1984 mentioned earlier intimating to the bank that by not doing so the bank

would be in breach of the agreement. The bank could very well refute that allegation in a more positive way but it did not. What it was interested was in the servicing of the interest which under the circumstances was not due from Chendering based on the capitalisation clause in the agreement and through no fault of Chendering in not being able to proceed on with the project to its completion.

In any event, on the part of Chendering, on 3 March 1985, DW2 wrote to the bank on behalf of Chendering and two other companies, and also in respect of Account No. 3928 of which he was interested informing the bank of the latest development on the account in question and the status of the project. This is found at pp. 37 to 42 of bundle "C" of the bank's bundle of documents. In respect of Chendering's account in particular, it is to be found at p. 40 thereof. On that the bank called for a review of the account again as evidenced by a handwritten minute of 8 February 1985 on the first page of the letter. Hence the third review of the facility was done which is found at p. 43 of bundle "C" dated 19 March 1985. This memorandum was again prepared by PW-2 addressed to Deputy General Manager, Credit Department, Eastern and Central. The background information given in the memorandum referred to the decision arrived at on account of the second review covered by the memorandum of 17 October 1984 wherein the bank has decided to request Chendering to service monthly interest as from November 1984 and to take steps to reduce/regularise the excesses/positions, failing which facilities are to be recalled. It is also reported in the latest memorandum that the bank decided to withhold action until a letter was received from DW2, which letter had since arrived which was dated 3 March 1985. This letter of Chendering is the one mentioned earlier informing the bank of the latest development on the account in question and the status of the project. The memorandum calls for further decision from the Deputy General Manager having provided the further development of Chendering. It is stated that there was no firm commitment on the part of Chendering to service the interest and regularise the account. Again the blame is put on Chendering for its failure to service the interest. The outstanding balance in the account as at 19 March 1985 stood at an excess of RM1,177,766.50 above the permissible limit of RM2.48 million. The decision arrived at as recorded on the letter is as follows:

> Excesses in the 3 a/cs are substantial and interest have been accumulating for a long time. In the letter submitted by the customer, there appears to be no firm commitment on their part to service the interest or regularise the excesses. I feel that the earlier decision should be enforced.
>
> initialed ...
> 28/3.

In compliance with the decision so arrived at, a letter dated 30 July 1985 mentioned earlier was sent out from the bank's branch in Chendering headquarters to the manager of the bank's Kuala Terengganu where the account of was operated. Hence, the facility was withdrawn.

Therefore, it is clear that a wrong step had been taken against Chendering simply for the improper keeping of the account by the bank in including into this account a sum of RM669,000 meant for the second stage of the facility granted and of the erroneous impression that it was Chendering who was not interested in the progress of the project whilst the non-progress of same was simply because the bank did not want to honour its obligation to provide the necessary fees for conversion of the subject land to residential. In the circumstances, I am satisfied that Chendering and its guarantors are not in breach of the agreement in not being able to complete the project, the purpose for which the facility of RM5 million was to be provided.

But the learned counsel for the bank submitted that Chendering was in breach of the agreement because it does not have a developer's licence to carry on with the project. I consider this line of submission as being an afterthought on his part. In the record of the bank, Chendering under the chairmanship of DW2 is not its only customers. Other companies where DW2 had a hold were also on account with the bank. They are in particular, Mohd. Anuar & Co, which is involved in project management and property management and was on the bank's panel of licenced appraisers apart from it being in possession of a valid housing development licence; MAE Realty Sdn. Bhd., a housing developer; and Mae Bina Sdn. Bhd., a general contractor where works on all projects were managed by Mohd. Anuar & Co. were carried out by this company. This evidence is found in the memorandum of 17 October 1984 prepared by PW2. So, when Chendering made the application for the facility of RM5 million, the bank must have taken all these into consideration when making the decision on the granting of the facility that barring any eventuality, the project proposed by Chendering would be feasible and no problem for the bank to recover the facility granted. Otherwise, the bank is not going to part with the amount of the facility being applied by a company like Chendering which had nothing but a mere paid up capital of RM250,000 with no other income generating from the company. According to PW1 before a facility of this nature is considered the customer has to furnish the feasibility study, project paper and other relevant information to enable the bank to process the application. He was aware that at that time Chendering had no other income except to come from this project. The expected income of Chendering is from the sales of houses and shop-houses arising out of the development and the proceeds would be used to pay the loan to the bank. According to him there

was nothing unusual about the arrangement. All the moneys paid out in exhibit "P2" were made with his approval. Nothing unusual for the bank not to have made out those payments for the purpose of the project. He also agreed that it is not unusual for no deposits made into the account by Chendering in the meanwhile as there was yet no income coming to Chendering. According to PW2 the loan facility in question was approved by loan committee 'A' at the bank's headquarters of which Dato Hashim, the then executive director was a member together with Dr. Rais Saniman, senior general manager; En. Wong Ah Pool, the bank adviser; and En. Radri Ayob, the service manager. It was a very strong committee indeed. PW2 also confirmed that to process a loan of such an amount as in the agreement, a customer must produce project paper, feasibility study and other documents. From the evidence gathered at this trial, Chendering had to undergo the normal process of applying for this facility. Standard application form of the bank was being used. This is what DW2 said in his evidence:

> To support my application there are two mandatory documents produced. They are project paper and valuation report. The project paper goes with the application form supplied by BBMB. I also submitted the valuation report. The project paper was prepared by me personally. I no longer had a copy of that project paper now. I certainly submitted the project paper along with the application.
>
> A project paper must contain items which is mandatory. A certain format must be followed. In the case of a housing project it must contain item (1) the land, description and all other details pertaining to the land. Item (2) it must contain the proposed development in term of density, types of houses, the mix and the viability relationship to the location of the land. It must also contain the estimated construction costs of the entire project and its detail division thereof. It must also contain the proposed selling price. It must contain the cash flow of the project.

Therefore, when the bank approved the facility, it must have taken every aspect of the matter into consideration bearing in mind the background of Chendering. Even in one of the conditions stipulated in the agreement is that there be auditors' confirmation that the paid up capital of Chendering is not less than RM250,000. The bank was quite contented with the minimum amount of paid up capital of RM250,000 and no more. With all the information in its possession, the bank must have been satisfied that it is feasible to grant the facility sought by Chendering. Further, from the evidence in exh. "D3" from as early as 24 November 1981 Mohd. Annuar & Co. had been issued with the developer's licence bearing No. 007482 and up to 16 April 1983 it has 23 endorsements for housing development in Terengganu. According to the evidence of DW2 Mohd. Annuar & Co. is a licenced and registered housing developer with the Ministry of Housing. So there would be no problem for

this company to undertake the project on behalf of Chendering and the bank was well aware of this. He went to testify that Chendering could not apply for such a licence as yet without first having the prerequisite of a fully converted land with sub-division and building plan approved. He said that the bank was aware of this prerequisite and was confident that Chendering would get a licence of its own when the time comes or for Mohd. Anuar & Co. to take over and develop the property on behalf of Chendering. According to the witness, most of the projects allowed in exh. "D3" were not of Mohd. Anuar & Co.'s own but undertaken by it on behalf of someone else. All the projects listed therein were completed by the company and most of them were financed by the bank. This piece of evidence was never challenged. In fact, through cross-examination of this witness, two documents were tendered respectively marked as exhs. "D10" and "D11". Exhibit "D10" is an agreement of 8 March 1982 between Chendering and Mohd. Anuar & Co. The latter was appointed by the former to manage the project as a developer of the subject land.

Exhibit "D11" is an agreement between Chendering and MAE Bina Sdn. Bhd. dated 13 December 1982 pertaining to the subject land. MAE Bina Sdn. Bhd. is being described therein as a contractor for carrying out the project for Chendering. Hence, I accept the evidence so given and convinced that those facts must have been within the knowledge of the bank when it decided to approve the application of Chendering for the facility of such an amount even though immediately Chendering has no income to spare. Therefore, it is too late in the day for the bank to raise this issue now.

Before, I move on to give my reasons for awarding the damages to Chendering on account of the breach of the agreement by the bank, I will deal with the evidence of DW2 raised by the learned counsel for the bank. The submission by the learned counsel on this issue is the non-availability of contemporary documents to support some of the oral evidence of DW2. I take heed of the submission and having considered the evidence of DW2 in its totality I have no reason to disbelieve him as there is nothing inherently incredible in the evidence of this witness. He did not say that he saw a cow jump over the moon.

With those findings, I will now move on to give reason for awarding damages in the sum RM29,279,017 with interest in favour of Chendering for the loss of profit suffered by it consequent upon the breach committed by the bank. En. Tommy Thomas drew my attention to the statement by the learned commentators in *Chitty On Contracts*, 1999, 28 edn, vol. 1 para 27-083:

> Contracts to lend money. In an action based on a lender's failure to provide the money promised, the normal measure of damages is the difference between the

cost of a substitute loan in the market, and the cost of the contracted loan: hence nominal damages will be usual, except where the claimant can obtain a loan elsewhere only 'at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms, or where the claimant cannot raise another loan, or so fails to complete his purchase'.

It is an elementary proposition without regards having had to the type of transaction involved here. Here is not a simple case of money lending. Of what use is the sum of RM24,180.70 being conversion fee asked for by the land authority or the sum of RM530,000 being the maximum amount stipulated in the agreement as being the conversion, sub-division and registration fees, or any other similar amount when upon the failure of the bank to make the appropriate provisions to Chendering as agreed upon in the agreement, the intended housing project of Chendering collapsed. Here is a case of a contract for a definite purpose, the consequent of its breach by the bank must have been within its contemplation of the likely damage done to Chendering. However, in this country, damages for breach of contract are governed by s. 74 of the Contracts Act 1950. The measure is compensation for any loss or damage caused by the bank (any remote and indirect loss or damage is excepted) which naturally arose in the usual course of things from the breach, or which both parties knew, when they made the contract, to be likely to result from the breach of it. In *Bank Bumiputra Malaysia Bhd. Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76, a case involving a company where DW2 has a hold and a company included in the memorandum dated 17 October 1984 for purposes of review of the various facilities granted by the bank, Abdul Hamid Omar LP at p. 91 says that s. 74 of the Contracts Act 1950 is declaratory of the common law rules as to assessment of damages in contract enunciated in *Hadley v. Baxendale.* Once the claimant has proved that the kind of damages suffered was foreseeable then the guilty party is liable to the full extent of it whether foreseeable or not provided that the extent of the damages claimed has been established on the balance of probabilities. Applying the principle above, on the facts of this case, when Chendering approached the bank for the facility of RM5 million to help finance the development of the subject land which is agricultural in its category of land use into a housing estate for sale at a profit, the bank knew that apart from a company with a paid up capital of only RM250,000, Chendering had no other income. The income was expected to come only upon the success of the intended project by the sale of the houses to be built thereat to the public. From this income Chendering expects to pay back the money owed from the bank. This is confirmed by the evidence of PW-1, a credit officer of the bank stationed at the branch in Kuala Terengganu at the material period of the granting of the facility. Even the agreement itself stipulates as one of the pre-

disbursement conditions that there be auditor's confirmation that the minimum paid up capital of Chendering is only RM25,000. Under normal circumstances no bank will be that stupid to readily extend any facility leave alone a maximum sum of RM5 million. I therefore, accept the evidence that the parties bargained at arm's length to reach such an agreement as the one dated 11 March 1982. The bank must have been presented with proper facts and figures by Chendering to enable it to make a quick decision to approve the facility sought to develop agricultural land held under leasehold titles into a housing estate. From the evidence, when making the formal application for the facility, however, Chendering followed the strict rule of the bank by submitting the relevant documents in support. According to PW1, the loan was processed out of negotiations between DW2 and headquarters in Kuala Lumpur. The terms and conditions in the agreement were given by the headquarters though the agreement letter of 11 March 1982 was issued out by PW1 at the branch office on the instruction of the headquarters. According to PW1 before a facility of this nature is ever considered by the bank, the applicant has to furnish the feasibility study, project paper and other relevant information to enable the bank to process the application. On the part of Chendering, there is the evidence of DW2 on the matter as quoted above concerning the mandatory documents submitted and the content thereof. The bank must have taken into consideration the reasonable profit Chendering would make at the end of the day upon the completion of the project and with that profit would easily pay back the facility granted with interest in the meanwhile to be capitalised. In this judgment I assess damages due to Chendering being the sum of RM29,279,017.58 with interest. The figure is based on the calculation recorded in exh. "D1" produced by Chendering which I accept as an appropriate measure of damages suffered by Chendering on account of the breach of the agreement by the bank. Bundle "G" is a copy of the valuation report dated 4 March 1982 on the subject land which Chendering submitted to the bank together with its application for the facility. The valuer, Rahim & Co. valued the subject property on the assumption that conversion and sub-division have been approved by the authorities at RM4 million. For the purpose of inclusion in the project paper, DW2 compiled a raw data which is represented by exhibit "D-1" Chendering proposed to build a total of 891 units of houses on the subject land of various types ranging from low cost flats to shop-houses. The estimated construction cost to built all those units was tabulated as RM20,493,219.60. The units were estimated to be sold for RM59,275,000. After deducting the total development cost of RM29,995,928.42 from the selling price of those unit, Chendering put the net profit from this project to be in the region of RM29,279,017.58. These figures were to the knowledge of the bank when the project paper was submitted to it by Chendering along with the application for the facility. According to DW2, the figure for the construction cost was obtained through the assistance of DW1, Dato' Wee Eng Hiang, a practicing

architect in Kuala Terengganu under the name of Architect Indahreka, Anuar & Co, and MAE Bina Sdn. Bhd. The evidence contained in this exh. "D1" was never at all challenged by the bank at the trial. During cross-examination, the witness was referred to three documents dated 25 February 1982 incorporated in the project paper prepared by the architect for the purpose of Chendering found at pp. 34 and 35 of bundle "D". According to the documents, total estimated infrastructure cost was RM5,295,961, and the building construction cost was RM22,770,244. These corresponding figures were higher than the figures quoted in exh. "D1". I do not use this as my basis of calculation for purposes of damages to be awarded as otherwise the amount would have been more. I accept the evidence for this purpose on the basis of exh. "D1" because it was a document prepared by DW2 as a basis upon which Chendering intended to apply for the facility in the first place and I do not have the benefit of viewing the project paper proper which was submitted by Chendering to the bank. I find nothing inherently incredible about the content of "D1". The learned counsel for the bank complained over the non-production of the project paper by Chendering. At the trial DW2 explained as to the absence of the document as the copy of it in his possession over the lapse of time has been mislaid. In any event step was taken by Chendering by serving a notice on the bank to produce the copy which was in its possession but the bank ignored the notice to produce. Under those circumstances, I have no alternative but to accept exh. "D1" as evidence for Chendering in supporting its claim for loss of profit, which document was never challenged by the bank.

I take note of the duty on the part of Chendering to mitigate. I am satisfied over the evidence before me that Chendering had taken all reasonable steps to mitigate the loss but without success. This is what DW2 on behalf of Chendering said in his evidence in answer to cross-examination by the learned counsel for the bank:

> In 1983 1 was in the panel of valuers for MBB, Perwira and UMBC. Rather than Chendering giving up, Chendering did go to all these three banks for refinancing. As a matter of facts we went to all the banks in Terengganu but the answer was that no bank would refinance a bad loan which Chendering was involved. The banks ought to know me as a financial consultant. That's why they laughed at my proposal to them. I did not have any evidence in writing but I orally approached the banks. That was normally the standard practice. Talk first and get the verbal approval. Then followed by a written application. It costs money and time to prepare project paper for a loan. Oral approval in principle is the norm. There was no rejection in writing either by the banks.

I accept this evidence of DW2 as being a reasonable step taken by Chendering to mitigate the loss suffered by the bank. Having determined the liability of the bank and the quantum of damages to be awarded to Chendering, I made an order against Chendering to pay the bank in respect of the amount of the facility so far utilised by Chendering before the breach. I also ordered two of the guarantors *ie* Mohamed @ Mohamed Anuar Embong and Maznah Mohd. Nor to jointly and severally do the same as I am satisfied that they are liable on the guarantee. It involves an amount of RM2,553,196.60 as evidenced by exh. "P2". I also ordered the payment of interest on the amount. I did not make the order against Muda Mohamed, the third guarantor, because he has since deceased and no step was taken by the bank to substitute the deceased guarantor as a party to the action. As to the cause of the two consolidated actions, I made an order that each party should bear its own costs.